IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1079

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND
SAMUEL E. LONG, INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT SAMUEL E. LONG, INCORPORATED, IN OPPOSITION

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OPINIONS BELOW

The judgment and order of the Court of Appeals are unreported (Pet. A5-5), as is the denial of Petitioner's petition for rehearing (Pet. A7). The decision and order of the

National Labor Relations Board (Pet. A1-4) are reported at 201 NLRB No. 42.[1]

JURISDICTION

The judgment order of the Court of Appeals was entered on September 19, 1973, and a petition for rehearing was denied on October 11, 1973 (Pet. A5-7). The petition for a writ of certiorari was filed on January 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly found that substantial evidence on the record as a whole supports the Board's finding that the Petitioner had a recognitional object when it picketed Long's job site.

2. Whether the Court of Appeals properly found that a demand for a "subcontractors clause" constituted a demand for recognition within the meaning of Section 8(b)(7)(C) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages A8-9 of the petition.

STATEMENT OF FACTS

Respondent Long, a general contractor engaged in the construction industry, was awarded a prime contract in 1971 for the construction of the East Senior High School by the West Chester Area School District, West Chester, Pennsylvania (S.A. 22; A. 61-62, 101).[2] Long's employees are not

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[1] References designated "A." and "S.A." are to the Appendix and Supplemental Appendix, respectively, filed with the Court of Appeals.

[2] The Board's decision and order, as reprinted in the appendix to the Petition, is incomplete, as it omits the decision of the Administrative Law Judge which was adopted almost totally by the Board (Pet. A1).

represented by any labor organization, and Long has no contracts with any labor organization (S.A. 21; A. 66). As a general contractor, Long performs some of the construction work with his own employees, and the remainder is contracted out to various subcontractors, some of whom are unionized and some of whom are not (S.A. 21-22; A. 66-68, 143). On the East Senior High job, most of Long's contractors were unionized (S.A. 22, n.4; A. 143).

On December 7, 1971, after work had begun on this job, the Council sent Long a letter signed by its attorney, demanding that Long execute a subcontractors agreement pursuant to which Long "would be obliged to subcontract to organizations dealing with craft unions affiliated with the Council" (S.A. 22; A. 137). If Long refused to execute such an agreement, the letter went on, the Council would picket the East Senior High School construction site (*ibid.*). Long refused to execute this agreement and picketing began on January 24, 1972 (S.A. 23; A. 72). The picket sign had the following legend:

> NOTICE
>
> Sam Long Contractor Refuses to enter into a Subcontractors Agreement with the Philadelphia Pennsylvania Building and Construction Trades Council AFL-CIO

(S.A. 23; A. 107). No petition has ever been filed, and it was stipulated that the picketing lasted for considerably longer than 30 days, being in effect at the time of the hearing herein (S.A. 23; A. 72-73). The picketing brought the construction work to a virtual halt because employees of the other prime contractors — for plumbing, heating and electrical work — whose employees were unionized, as well as employees of Long's unionized subcontractors, refused to cross the Council's picket line (S.A. 23; A. 73-74).

On January 24, 1972, the day the picketing began, William Dowler, the Director of Personnel of the West Chester Area School District, and Donald Howland, the School District's Business Manager (A. 12-13, 22), went to the construction site to observe the picketing. There, they met with two union officials, Robert Williams and Charles Boyer (A. 15). During the course of the conversation, Dowler asked what the nature of the picketing was, to which Williams replied, "It is organizational" (Pet. A2; S.A. 16, 23; A. 16, 17, 23). Howland then asked if the pickets were there to organize Long because he was non-union, and Williams replied, "Yes," while Boyer nodded his head in the affirmative (Pet. A2; S.A. 16, 23; A. 17, 23).

At the time of this conversation, Williams, business agent of Elevator Contractors Local No. 5, was a vice-president of the Petitioner Council as well as Local 5's delegate to the Council, while Boyer, a business agent of the Carpenters District Council and a delegate to the Petitioner Council, was chairman of the committee in charge of the pickets at the East Senior High School site (S.A. 17, 25, n.5; A. 30-33).

PROCEEDING BELOW

The Board concluded, in agreement with its Administrative Law Judge, that the Petitioner violated Section 8(b) (7) (C) by picketing for a recognitional object for more than 30 days without filing a representation petition. The crucial legal determination underlying this conclusion was that a demand for a subcontractors agreement was tantamount to a demand for recognition and, therefore, that the picketing had a recognitional object (S.A. 16, 28-31). Additionally, and without regard to the above, the Board held that the Petitioner's picketing objective was recognitional in view of the statements of Council representatives Williams and Boyer to this effect and, therefore, that the Petitioner was thereby

seeking to force or require Long's employees to accept or select the Council as their bargaining agent, thus violating Section 8(b)(7)(C) of the Act (S.A. 16-18, Pet. A2-3).

On petition for enforcement, in which Long intervened as a party, the Court of Appeals affirmed the Board's findings and conclusions, and enforced its order (Pet. A5-6); the Council's subsequent petition for rehearing was denied (Pet. A7).

ARGUMENT

It is undisputed that the Council's picketing at the East Senior High School job site lasted for more than 30 days and that no representation petition was ever filed. Thus, two of the three criteria for a violation of Section 8(b)(7)(C) of the Act (Pet. A8) have plainly been met. Only the third — whether an object of the picketing was for recognition or to force or require Long's employees to accept the Council as their bargaining representative — was in issue. The Board found that a recognitional object existed on alternative ground — one factual and one legal — either of which would itself sustain the Board's unfair labor practice determination. Accordingly, no issue warranting Supreme Court review is presented.

1. The statements of Council officials Williams and Boyer, made contemporaneously with the inception of the picketing and directed to two officials of the West Chester Area School District (*supra*, p. 4), clearly affirmed that an object[3] of the picketing was to organize Long because he was non-union. Plainly, Petitioner is bound by the statements of its own responsible officials. *National Labor Rela-*

[3] It is sufficient that *an* object be a proscribed one; it need not be the *only* object. See *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U.S. 675, 688-689 (1951); *International Hod Carriers Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1167 n.28 (1962).

tions Board v. Brewery and Beer Distributor Drivers, Local 830, 281 F.2d 319, 322 (C.A. 3, 1960); *National Labor Relations Board v. International Brotherhood of Teamsters, Local 249*, 249 F.2d 292 (C.A. 3, 1957).

On this ground alone the Board could, and did, base a finding that Section 8(b)(7)(C) had been violated (Pet. A3) Petitioner's contrary argument (Petition, pp. 26-28) merely raises an evidentiary issue which plainly does not warrant Supreme Court review. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

2. Contrary to Petitioner's assertion, the courts of appeals have consistently held that a union demand for a contract clause that restricts an employer from subcontracting to other than union subcontractors is for an object of recognition within the purview of Section 8(b)(7) of the Act. *Dallas Building & Construction Trades Council v. National Labor Relations Board*, 396 F.2d 677 (C.A.D.C., 1968); *Centralia Building & Construction Trades Council v. National Labor Relations Board*, 363 F.2d 699 (C.A.D.C., 1966); *Lane-Coos-Curry-Douglas Counties Building & Construction Trades Council v. National Labor Relations Board*, 415 F.2d 656 (C.A. 9, 1969). There is no conflict among the circuits.[4]

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[4] The early Board decisions on which Petitioner relies to demonstrate an alleged inconsistency within the Board itself — *Building and Construction Trades Council (Winzeake, Inc.)*, 14 NLRB 38 (1963) and *I.B.E.W., Local 903 (Pass Development, Inc.)*, 154 NLRB 169 (1965) — are not to the contrary. *Winzeake* was litigated on the theory that the union was seeking to organize the employees of the subcontractors, an object that the Board found not to have been factually established (141 NLRB at 39, n.2). And *Pass Development*, unlike this case, did not involve the execution of a continuing agreement between the company and the union, and both the Board and the Court of Appeals in *Dallas* distinguished *Pass Development* on this ground (164 NLRB at 942; 396 F.2d 677).

The "hot cargo" cases upon which Petitioner relies — *Essex County and Vicinity District Council of Carpenters v. National Labor Relations Board*, 332 F.2d 636 (C.A. 3, 1964); *Construction, Production Union Local 383 v. National Labor Relations Board*, 323 F.2d 422 (C.A. 9, 1963); see also cases cited Pet. 11, 19 — are wholly distinguishable. Those cases stand for the proposition that picketing by a bargaining representative for a subcontractors clause is valid under the "construction industry" proviso to Section 8(e) of the Act. The representative status enjoyed by the union in *Essex County* and the other cases is exactly what is missing here, for Petitioner freely admits that it does not represent Long's employees and, indeed, disclaims any intention of seeking to represent them. What *Essex County* and similar cases establish is that a demand for a subcontractors clause may lawfully be made only by the certified or recognized representative of the employer's employees. Picketing for such a clause by Petitioner in the instant case merely demonstrates Petitioner's recognitional object, which is the central holding of this case.

CONCLUSION

There is, in short, no conflict among the circuits and the instant case presents no issue warranting review by this Court. Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 11, 1974.